incurable diseases",[9] "gross immorality",[10] have been held by weight of authority not vague or uncertain although they do not state in advance what specific acts or diseases included therein may be in violation thereof. Their ascertainment is left to the common judgment. From the foregoing considerations it seems that the statute might have been upheld. The dissenting opinion commends itself as a clear, concise and accurate view of the law.

R. J. J.

CONSTITUTIONAL LAW: TRADING STAMPS.—The almost uniform denial of the power of a state legislature to pass a law prohibiting the use of trading stamps, on the ground that such laws violate the due process provision of the Fourteenth Amendment, has been broken by the Washington decision in the case of *State v. Pitney*.[1]

The constitutionality of anti-trading stamp legislation has been passed upon in two well-considered cases in California. In the earlier case,[2] the validity of a municipal ordinance, which imposed a prohibitive license tax on merchants using trading stamps, was denied. In this case Chief Justice Beatty, speaking for the court, declared that there was nothing in the nature of a lottery or of gambling in the use of trading stamps. "It appears to be simply a device to attract customers, or to induce those who have bought once to buy again, and in this aspect is as innocent as any form of advertising." In the later case,[3] there was involved an act of the legislature of 1905 making it a misdemeanor to issue trading stamps and coupons. The court held that the act did not fall within the limits of the police power of the state. Mr. Justice McFarland said: "The law therefore, being settled that the legislature cannot prohibit or seriously interfere with the right of the citizen to make harmless contracts touching the acquisition, protection, management, and enjoyment of property,—contracts which do not wrongfully affect the lawful rights of others or the public safety, health, or morals,—the remaining question in these cases at bar is whether trading-stamps or coupons constitute contracts which are outside the protection of the constitutional principles above declared." And in answer to that question, he said "Indeed, an ordinary trading-stamp or coupon is in substance a mere form of allowing discounts on cash payments, and its issuance is entirely harmless and within the constitutional right to contract. It may be distasteful to certain competitors in business; but the latter should remember that if a statute suppressing it be upheld,

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[9] State Med. Bd. of Arkansas Med. Society v. McCrary (1910), 95 Ark. 511, 130 S. W. 544, 22 Ann. Cas. 631.

[10] Meffert v. State Bd. of Med. Registration & Ex. (1903), 66 Kan. 710, 72 Pac. 247, 1 L. R. A. (N. S.) 811, affirmed in 195 U. S. 625.

[1] (1914), 140 Pac. 918.

[2] Ex parte McKenna (1899), 126 Cal. 429, 58 Pac. 916.

[3] Ex parte Drexel (1905), 147 Cal. 763, 82 Pac. 429.

then other oppressive statutes might be enacted unlawfully interfering with and hampering business and the right of contract to which these competitors would strenuously but vainly object."

There are a few cases, cited below,[4] which either uphold, or wink at, anti-trading stamp legislation. "With respect to these cases", to quote the appropriate observation of Mr. Justice McFarland, "we do not deem it necessary to consider the suggestion of petitioners that they are distinguishable from the mass of cases above cited [denying the validity of such legislation]; whatever they may hold, they are not of sufficient consequence to ruffle the great current of authority which runs the other way."[5]

The Supreme Court of Washington had formerly gone with the general current of authority,[6] and, in order to take its new position, is compelled to overrule its previous decision. The ground on which the court now proceeds is that the police power has received a new and larger interpretation in recent years. The cases cited in the footnote are relied on as authority.[7] The doctrine of these cases is that the police power of a state "embraces regulations designed to promote the public convenience, or the general prosperity", that "it extends to all great public needs", and "may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." This broader conception of the police power is to be warmly welcomed. The only question is whether the court in the principal case is making a proper application of the modern rule. It is submitted that the court has gone too far in its desire to uphold the will of the legislature. What seems the correct position is expressed by the Virginia Supreme Court of Appeals, declaring invalid an act prohibiting the use of trading stamps,[8] in the following words: "Indulging every possible presumption in favor of the validity of the statute now under consideration, we are constrained to the conclusion upon reason and authority, that it is not a valid exercise of legislative power. It attempts to prohibit and restrain the defendant in the lawful prosecution of a lawful business. 'The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations.' Lawton v. Steele, 152 U. S. 133, 137, 14 Sup. Ct. 499, 501, 38 L. Ed. 385."

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[4] Lansburg v. District of Columbia (1897), 11 App. Cas. D. C. 512; Humes v. City of Fort Smith (1899), 93 Fed. 857; State v. Hawkins (1902), 95 Md. 146, 51 Atl. 850.

[5] Ex parte Drexel (1905), 147 Cal. 763, 82 Pac. 429.

[6] Leonard v. Bassindale (1907), 46 Wash. 301, 89 Pac. 879.

[7] Chicago, B. & Q. R. R. Co. v. Illinois (1906), 200 U. S. 561, 50 L. Ed. 596, 26 Sup. Ct. 341; Noble State Bank v. Haskell (1911), 219 U. S. 104, 55 L. Ed. 112, 31 Sup. Ct. 186; Schmidinger v. Chicago (1913), 226 U. S. 578, 57 L. Ed. 364, 33 Sup. Ct. 182.

[8] Young v. Commonwealth (1903), 101 Va. 853, 45 S. E. 327.

Furthermore, the United States District Court for the Eastern District of Washington, passing upon the same statute as in our principal case, has declared the act unconstitutional.[9] Speaking through Judge Rudkin, the court said: "The use of trading stamps and similar devices is neither more nor less than a legitimate system of advertising, and those who employ that system are entitled to the protection of the Constitution of the United States."

W. C. J.

CONTRACTS: BREACH ON BOTH SIDES MAY NOT PRECLUDE AN ACTION IN EQUITY TO RESCIND.—The case of *Crowe v. Oscar Barnett Foundry Company*[1] was a bill in equity to procure the rescission of an assignment contract. Crowe was the owner of a patent for a certain mechanical stoker, and, in consideration of an agreement on the part of the foundry company to pay to him a stipulated royalty, he granted to the company an exclusive license to manufacture this stoker under his patent. Shortly after the making of this agreement, Crowe began infringing by installing a stoker for a certain firm, and thereupon the foundry company procured from a court of equity an injunction restraining this breach.[2] This injunction was subsequently dissolved, and damages awarded against Crowe.[3] For about three years after the date of the first action, the foundry company operated under this contract, and paid royalties to plaintiff. It then abandoned the contract, and made no further payments. Upon this state of facts, the question arose whether plaintiff's prior breach would preclude him from maintaining an action in equity to rescind the contract. The court held that the conduct of the foundry company in retaining the exclusive control of the patent without paying any compensation therefor, operated to inflict upon plaintiff an injury for which he had no adequate remedy at law, and a rescission of the contract was granted.

There can be no doubt as to the correctness of the decision in this case, but the grounds upon which it proceeds are not altogether clear. In giving judgment the court said: "This suit being in equity and not an action at law, the fact that there has been fault on both sides does not preclude the granting of the proper relief to Crowe." This language seems to intimate that if an action had been brought at law, plaintiff's prior breach would have defeated his recovery. But if this is the proper construction to place upon this language, it is not a correct statement of the law. The right to maintain an action at law to recover back what has

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[9] Little v. Tanner (1913), 208 Fed. 605.

[1] (May 8, 1914), 213 Fed. 864.

[2] Oscar Barnett Foundry Co. v. Crowe (1912), 80 N. J. Eq. 112, 74 Atl. 964.

[3] Oscar Barnett Foundry Co. v Crowe (1912), 80 N. J. Eq. 112, 86 Atl. 915, affirmed in 80 N. J. Eq. 258.